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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,

12 Respondent,

13 v.

14 TANH HUU LAM,

15 Movant.
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No. 2:97-cr-0054 WBS KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

17 Movant is a federal prisoner, proceeding without counsel. Pending before the court is
18 movant's January 30, 2017 motion for relief from judgment.¹ (ECF No. 479.) For the following
19 reasons, the undersigned recommends that this motion be denied.

20 Background

21 On June 25, 1999, movant pleaded guilty to committing arson resulting in death, in
22 violation of 18 U.S.C. §§ 844(i) and 2. On November 1, 2002, movant filed a motion pursuant to
23 28 U.S.C. § 2255. (ECF No. 358.) On March 6, 2003, the Honorable William B. Shubb granted
24 respondent's motion to dismiss the § 2255 motion. (ECF No. 370.) Judge Shubb found that
25 movant's claims were barred because they alleged constitutional violations that occurred before
26 he entered his guilty plea. (Id. at 3-4.) Judge Shubb also found that movant's failure to raise the
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28 ¹ On February 1, 2017, the Honorable William B. Shubb referred this motion to the undersigned.

1 voluntariness and intelligence of his plea on direct review barred him from attacking it through
2 his habeas petition. (Id.)

3 On April 15, 2004, the Ninth Circuit Court of Appeals affirmed Judge Shubb's March 6,
4 2003 order denying movant's § 2255 motion. (ECF No. 378.) On October 18, 2004, movant
5 sought leave from the Ninth Circuit to file a second or successive § 2255 motion. (ECF No. 412
6 at 2.) On January 24, 2005, the Ninth Circuit denied movant's application for authorization to file
7 a second or successive motion pursuant to 28 U.S.C. § 2255. (ECF No. 381.)

8 On January 18, 2005, movant filed a motion to vacate his guilty plea pursuant to Rule
9 11(c) of the Federal Rules of Criminal Procedure and Rule 60(b) of the Federal Rules of Civil
10 Procedure. (ECF No. 379.) In this motion, movant challenged the validity of his conviction.
11 (Id.) On May 3, 2005, Judge Shubb denied this motion. (ECF No. 395.) Judge Shubb found that
12 the grounds asserted in support of the motion to vacate the guilty plea were the same as those
13 which were raised, or at least could have been raised, in movant's earlier filed motions under 28
14 U.S.C. § 2255. (Id. at 1.) Judge Shubb noted the Ninth Circuit's previous order denying
15 movant's request to file a second or successive motion pursuant to 28 U.S.C. § 2255. (Id. at 2.)

16 On September 15, 2005, movant filed another motion pursuant to Rule 60(b) which
17 challenged the integrity of his § 2255 proceedings. (ECF No. 403.) On November 30, 2005,
18 Judge Shubb denied this motion as a successive motion pursuant to 28 U.S.C. § 2255. (ECF No.
19 412.)

20 On May 18, 2009, movant filed a motion to invalidate his guilty plea pursuant to Federal
21 Rule of Criminal Procedure 11(e). (ECF No. 431.) On August 20, 2009, Judge Shubb denied this
22 motion. (ECF No. 446.)

23 On May 12, 2014, movant filed a motion for relief from judgment. (ECF No. 461.)
24 Movant argued that Judge Shubb erred in denying his original § 2255 motion on the grounds that
25 movant's guilty plea barred consideration of his pre-plea ineffective assistance of counsel claims.
26 (Id.)

27 On March 13, 2015, the undersigned recommended that movant's May 12, 2014 motion
28 for relief from judgment be denied. (ECF No. 465.) Judge Shubb adopted the March 13, 2015

1 findings and recommendations on April 28, 2015. (ECF No. 470.)

2 Pending Motion

3 Movant labels the pending motions as a “motion for relief from the judgement...” (ECF
4 No. 479 at 1.) Although somewhat difficult to understand, it appears that movant is arguing that
5 Judge Shubb erred in finding that his claims raised in his original § 2255 motion challenging the
6 voluntariness and intelligence of his plea were barred because he failed to raise them on direct
7 appeal. (Id. at 5-10.) Movant appears to argue that the Supreme Court in Massaro v. United
8 States, 538 U.S. 500 (2003) held that ineffective assistance of counsel claims may be raised in a
9 § 2255 motion whether or not they were previously raised on appeal. (Id.) Movant cites several
10 district court cases allegedly citing Massaro for this proposition. (Id.)

11 Movant raised his argument regarding Massaro in his motion for relief from judgment
12 filed on September 15, 2005. (ECF No. 403). On November 30, 2005, Judge Shubb denied this
13 motion as a successive motion pursuant to 28 U.S.C. § 2255. (ECF No. 412.) Accordingly, the
14 undersigned recommends that the instant motion also be denied as a successive motion under 28
15 U.S.C. § 2255. Movant has not obtained a certificate from the Ninth Circuit Court of Appeals
16 permitting him to proceed with this successive § 2255 motion. See 28 U.S.C. § 2255(h).

17 Applications to Proceed In Forma Pauperis and Motion for Appointment of Counsel

18 Apparently in support of the pending motion, movant has filed two separate applications
19 to proceed in forma pauperis. (ECF Nos. 477, 480.) A motion under § 2255 is filed as part of the
20 underlying criminal prosecution, and therefore does not require payment of a filing fee as does a
21 petition for a writ of habeas corpus. See 28 U.S.C. § 2255. Because movant was not required to
22 pay any fees to file this motion, there is no need for movant to proceed in forma pauperis.
23 Accordingly, the motions to proceed in forma pauperis are denied as unnecessary.

24 Movant has also filed a motion for the appointment of counsel. (ECF No. 482.) Because
25 the undersigned recommends that the pending motion be denied as a successive § 2255 motion,
26 movant’s motion for appointment of counsel is denied.

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1 Accordingly, IT IS HEREBY ORDERED that:


2 1. Movant's motions to proceed in forma pauperis (ECF Nos. 477, 480) are denied;

3 2. Movant's motion for appointment of counsel (ECF No. 482) is denied;

4 IT IS HEREBY RECOMMENDED that movant's motion for relief from judgment (ECF
5 No. 479), construed as a successive motion pursuant to 28 U.S.C. § 2255, be denied.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, movant may file written objections
9 with the court and serve a copy on all parties. Such a document should be captioned "Objections
10 to Magistrate Judge's Findings and Recommendations." If movant files objections, he shall also
11 address whether a certificate of appealability should issue and, if so, why and as to which issues.
12 A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a
13 substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Movant is
14 advised that failure to file objections within the specified time may waive the right to appeal the
15 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 Dated: April 19, 2017

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18 KENDALL J. NEWMAN
19 UNITED STATES MAGISTRATE JUDGE

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